

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

WILLIE CARL LYONS,

Petitioner,

No. CIV S-96-0784 GEB GGH P

vs.

THEO WHITE,

Respondent.

ORDER &

FINDINGS AND RECOMMENDATIONS

Petitioner moves for relief from this court's order and judgment entered February 28, 2001, denying his petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner also moves for appointment of counsel. (Doc. 78, 79). Petitioner filed similar motions in 2006, which were denied by this court on March 14, 2007, and May 5, 2007. (Doc. 74, 77). As in his prior motions, petitioner seeks relief pursuant to Fed. R. Civ. P. 60(b), to obtain reconsideration of the court's dismissal of his original Claims 1, 2, 5, 6, and 7, on the ground that petitioner has obtained new evidence demonstrating his actual innocence. This evidence is purportedly set forth in numerous affidavits (not provided to the court) which together demonstrate that the victim of the assaults for which plaintiff was convicted and is presently incarcerated, was in fact a willing participant.

The instant motion for relief from judgment is construed as a successive

1 application for a writ of habeas corpus, presenting the same claims raised in petitioner's initial
2 application. The instant application must therefore be dismissed. See 28 U.S.C. § 2244(b)(1).
3 Petitioner may pursue a successive habeas corpus application in this court pursuant only to
4 authorization by the Ninth Circuit Court of Appeals. See 28 U.S.C. § 2244(3)(A).

5 Petitioner also requests appointment of counsel. There currently exists no
6 absolute right to appointment of counsel in habeas proceedings. See Nevius v. Sumner, 105 F.3d
7 453, 460 (9th Cir. 1996). However, 18 U.S.C. § 3006A authorizes the appointment of counsel at
8 any stage of the case "if the interests of justice so require." See Rule 8(c), Fed. R. Governing
9 § 2254 Cases. The court does not find that the interests of justice would be served by
10 appointment of counsel at the present time.

11 Accordingly, IT IS HEREBY ORDERED that petitioner's motion for appointment
12 of counsel, filed September 11, 2009 (Doc. 78), is DENIED.

13 Further, IT IS HEREBY RECOMMENDED that petitioner's motion for relief
14 from judgment, filed September 11, 2009 (Doc. 79), be DISMISSED.

15 These findings and recommendations are submitted to the United States District
16 Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within ten
17 (10) days after being served with these findings and recommendations, any party may file written
18 objections with the court and serve a copy on all parties. Such a document should be captioned
19 "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections
20 shall be served and filed within ten (10) days after service of the objections. The parties are
21 advised that failure to file objections within the specified time may waive the right to appeal the
22 District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

23 DATED: December 16, 2009

24 /s/ Gregory G. Hollows

25 GREGORY G. HOLLOWES
26 UNITED STATES MAGISTRATE JUDGE